THE VALIDITY OF UNSEALED BALLOTS IN VIRGINIA.

I. Introductory—The Questions Stated.

THE precise subject proposed for discussion is whether or not the absence from official ballots of the seal which the Virginia Code [1] requires the electoral board to affix thereto invalidates the ballot. Stated a little differently, is the requirement directory merely, or is it mandatory?

In discussing the question, we shall assume that the requirement, however construed, is not open to attack on constitutional grounds, as an undue limitation of the right of suffrage under the Constitution.[2]

The question is not of such restricted appeal to the interest or of such infrequency of presentation as the casual or uninformed reader might suppose. When we take into consideration the facts that the requirement of the seal dates back to 1894, and that the seals used by many of those boards are old and worn and make but indifferent impressions at best; that (as is believed) it is the habitual practice of such boards to attempt to impress the seal upon ballots, not one by one, but upon a number at a time (a virtual necessity where the electorate is large) resulting in the making of but a faint impression, or none at all; and that consequently the question proposed is one of at least potential existence in nearly every election that may be held—as a matter of fact, it has arisen acutely in at least two recent contested election cases—under these circumstances, the subject may well evoke the interest, not only of the bench and bar, but of the citizenship of the State.

The Australian Ballot system was adopted in Virginia under the terms of the so-called "Walton Law." [3] As subsequently

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[1] Section 122d.

[2] *Vide* argument of losing side in Pearson *v.* Supervisors (1895), 91 Va. 322; Moyer *v.* Van de Vanter (Wash. 1895), 41 Pac. 60.

[3] Acts 1893-4, p. 862.

amended, principally to meet the requirements of the Constitution of 1902, that law is the law of Virginia today, having been carried into Pollard's Code as §§ 122a-122o, inclusive. By § 122d, each electoral board is required to procure and adopt a seal, and to affix it on the back of every official ballot. Section 122h provides for the method of voting, contains directions as to how the voter shall prepare his ballot, and goes on:

> "* * * and no ballot, save an official ballot specially prepared as above provided for, shall be counted for any person."

It also directs that the ballot shall be handed to the judge of election, who shall deposit it without examining it, except to satisfy himself that it is genuine, "for which purpose he may, without looking at the printed inside of the ballot, inspect the official seal upon the back thereof."

It is apparent that a proper construction of the words

"An official ballot specially prepared as above provided for."

is vitally important.

On the one hand it is contended that this language means an official ballot "prepared" in the form provided for by law, the requirement as to sealing constituting an important part of such "preparation."

In support of this view stress is laid upon the statutory direction that the judge of election may, in order to see whether the ballot is genuine, "inspect the official seal" upon its back, upon which is based the argument that the presence *vel non* of the seal constitutes the test as to the "genuineness" of the ballot. The mandatory language that "no ballot, save an official ballot specially prepared as above provided for, shall be counted" is accordingly held utterly to invalidate all ballots whose official character is not attested by the official seal.

It may be freely conceded that if this construction is correct, the absence of the seal would wholly invalidate the ballot. As has been said:[4]

> "Prohibitory words can rarely, if ever, be directory. There is but one way to obey the command 'thou shalt not,' which is to abstain altogether from doing the act forbidden."

[4] State *v.* Connor (Tex. 1893), 23 S. W. 1103, at p. 1107.

On the other hand the argument is that the language "specially prepared as above provided" refers to the "preparation" of the ballot by the voter; that accordingly the only mandatory requirements of the statute are twofold, (1) that the ballot shall be an "official ballot," and (2) that it shall be "prepared" by the voter in the manner provided for by statute; that the "official" character of the ballot, if disputed, may be proved by evidence *aliunde,* if indeed it is not to be presumed, *prima facie,* under the maxim *omnia rite præsumuntur acta;* and finally that the requirement as to sealing is simply one of a number of precautions which, while they should, in the apt language of some of the courts, be regarded by election officers as "mandatory before the election," yet are not, in the omission, of such profound consequence as to defeat the will of the electorate as declared at the polls.

The question above stated is a pure question of construction. If "prepared" be construed to refer to preparation by the electoral board, including sealing, the unsealed ballots, in that case, would be clearly invalid. If, on the other hand, "prepared" refers merely to preparation by the voter, a further question arises as to the effect of non-compliance with § 122d, whereby the requirement of sealing is made.

II. Discussion of the Questions.

Contested election cases are not appealable in Virginia,[5] and accordingly, as to most questions arising therein, we are remitted to the "internal evidence" afforded by the statutes themselves, supplemented by general principles and collateral authority from elsewhere.

(1) *The Question of Construction.*

As to the primary question here involved—the question of construction—the Virginia statute is so exceptional in character that only the first of these aids is available. We accordingly proceed at once to a consideration of the Virginia statutes.

Reviewing rapidly the terms of the Walton Law, as it now

[5] Code, § 161.

exists, we find that § 122a relates to giving notice of candidacy by candidates; § 122b, to the printing of the ballots, which are to be white paper tickets, without distinguishing mark or symbol, containing the names of the offices and candidates printed in black ink in "due and orderly" (*quære*: does this mean alphabetical?) succession in plain Roman type not smaller than pica; § 122bb, to the oath to be taken by the printer, in order to keep secret the form of the ballots and to safeguard their official character; and § 122c to the printing of the ballots in elections for President and Vice-President.

Section 122d is that which makes provision for affixing the seal to the ballots, and the distribution of the ballots to the various election precincts.

Section 122e provides for the opening and counting of the ballots by the election officials before the election; § 122f for the furnishing of booths for voters, to contain pen and ink; and § 122g for the manner of approaching the ballot box, and the order of voting.

Then follows § 122h, which, since the controversy largely turns on its proper construction, is here set out in full:

> "Every elector qualified to vote at a precinct shall, when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present. The said elector shall then take the said official ballot and retire to said voting booth. He shall then draw a line with a pen or pencil through the names of the candidates he does not wish to vote for, leaving the title of the office and the name or names of the candidates he does *not* [should be omitted; evidently a typographical error] wish to vote for unscratched. No name shall be considered scratched unless the pen or pencil mark extends through three-fourths of the length of said name; and no ballot, save an official ballot specially prepared as above provided for, shall be counted for any person. He shall fold said ballot with the names of the candidates on the inside and hand the same to the judge of the election, who shall place the same in the ballot box without any inspection further than to assure himself that the ballot is a genuine ballot, for which purpose he may, without looking at the printed name inside of said ballot, inspect the official seal upon the back thereof: provided,

> it shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein in writing the name or names of any person or persons for any office for which he may desire to vote."

With this summary of the statute law in mind, let us now consider the meaning of the pivotal clause

> "* * * and no ballot, save an official ballot specially prepared as above provided for, shall be counted for any person."

(a) We remark, first, that this clause does not constitute a sentence by itself, but is the last half of a sentence the first half of which reads as follows:

> "No name shall be considered scratched unless the pen or pencil mark extends through three-fourths of the length of said name;"

and the whole preceding portion of the section under consideration relates to the procuring of an official ballot by the voter and its preparation by him. The section itself, as enacted by the legislature,[6] is headed "Method of Voting" and relates to that subject.

The question, then, is whether the words "specially prepared as above provided for" relate to what precedes in the same section, concerning the preparation of the ballot by the voter, or to §§ 122b, bb, and d, relating to their "preparation" by the electoral boards. In order for them to have the latter relation, it is necessary for the reference to skip over everything that precedes in § 122h, including the first part of the very sentence in which they occur, and also to overleap §§ 122g, f, and e, none of which refers to the "preparation" of ballots by anybody.

It seems clear to the writer that of the two possible references of the words "prepared as above provided," it is more natural, reasonable and sensible that they should refer to what immediately, rather than remotely, precedes—especially when the latter is separated by much wholly irrelevant matter.

(b) Secondly, if the phrase "prepared as above provided for"

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[6] Acts 1902-3-4, p. 922, at p. 930.

relates to preparation by the electoral board, we must remember that the affixing of the seal is but a step in such "preparation." Since, as we have seen, the clause in question is mandatory, it follows, if the clause under consideration be given this relation, that if the ballots are printed upon paper which some court might hold not to be "white;" or if printed in any other than Roman type; or if the type be Roman but smaller than pica; or when the names of the candidates are not printed in the undefined "due and orderly" succession provided for by the statute; or, perhaps, if the printer fail to take the prescribed oath; or if some member of the electoral board fail to be present during the whole time of the printing of the ballots (a requirement of § 122d which, we think it probable, is more honored in the breach than in the observance); or, maybe, if the electoral board fail to "count" the ballots as required by § 122d (as to which we believe the same condition prevails, at least where the number of ballots is very large); then, in each or at least in many of such cases, the result would follow that, no matter how undoubted the official character of the ballots, however untainted by fraud, however uniform within the spirit of the Australian ballot system, a wholly innocent electorate would find itself disfranchised. Such a result should undoubtedly be avoided if a reasonable construction of the statute will permit its avoidance.

(c) In the third place, when we examine the laws of Virginia *in pari materia,* we have been able to find the words "prepare" and "preparation" used but twice[7] in connection with ballots, and in each place they refer unmistakably to preparation by the voter and not by the electoral board.

(d) It will not do to say that this clause, when construed to relate to "preparation" by the voter, is superfluous by reason of the provision that no name shall be considered scratched unless the pen or pencil mark extends through three-fourths of the length of said name, for there are various other ways in which a voter might indicate a choice than by scratching. He might, as is done in some States, use a paster to be pasted over

[7] Const., § 21; Code, § 122kk.

the name, or he might write upon the ballot "I vote for," followed by the name of the candidate, or he might place a cross mark, as is done in many States, before the name of the candidate for whom he wished to vote, and in either one of these cases, were it not for the provision that only ballots prepared as provided in § 122h should be counted, election officials would have difficulty in determining what disposition to make of the ballot. Accordingly, the clause in question supplies a real need by pointing out, in mandatory fashion, the exclusive way in which the voter's choice may be indicated.

It is true, however, that § 122h provides that the judge of election may, in order to assure himself that the ballot is genuine, "inspect the official seal upon the back thereof;" but this provision is a mere part of a limitation upon the right of inspection of ballots by the election officers, and, in the view of the writer, the utmost that could be claimed for it is that it would give the election officers the right to reject a ballot not bearing the official seal. As has been frequently said by the courts, all provisions of election laws should be regarded as mandatory before the election.[8] An election officer might well reject an unsealed ballot, thus giving an honest elector an opportunity of securing a proper ballot and casting his vote; but it is a vastly different proposition to say that such a ballot, honestly cast, may be received, the voter lulled into a sense of security, and the ballot subsequently rejected. To accomplish such a result, the legislature should use unequivocal language; and this we think is sustained by the authorities presently to be noticed.

We think it very clear, therefore, having regard to the internal evidence furnished by the language of the election laws, that the words "specially prepared as above provided for" refer to the preparation of the ballot by the voter. If this be true, it follows that the only ballots which the statute expressly invalidates are (1) ballots not official, and (2) ballots not prepared by the voter as required by the statute; i. e., by having the names of candidates scratched three-fourths of the way

[8] *E. g.*, in Jones *v.* State (Ind. 1899), 55 U. S. at p. 233; Miller *v.* Pennoyer (Ore. 1893), 31 Pac. 830.

through. This construction is aided by the principle that the right of suffrage is a favored right, and hence that where the construction of a statute is doubtful, the doubt is ordinarily resolved in favor of the right to vote.

> "The right to vote and have the vote counted should not be taken away by any doubtful construction of a statute, and before the voters should be shorn of the privilege it must be clear that, under the circumstances then existing, the legislature intended such to be the case." [9]

(2) *The Effect of Non-Compliance with § 122d.*

Assuming, then, that the construction of § 122h is as we have indicated, the further question is presented as to the effect of non-compliance with § 122d as to sealing.

The two great purposes of the Virginia law, so far as it relates to ballots, are the prevention of fraud through "stuffing" the ballot box and the preservation of the right of secrecy. To secure the first, it is provided that none but official ballots may be used; and to ensure the second, the "scratching" of the ballots is to be done in such a way that there will be no distinguishing mark. The seal is, unquestionably, evidence of the official character of the ballot, but the fact of the official character is a more important thing than the evidence of it. As Judge Keith said on a cognate question—he was discussing the right of secrecy—in Pearson *v.* Supervisors: [10]

> "The main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy."

If the absence of a seal invalidates a ballot the "main object," as defined by Judge Keith, would be defeated, not indeed by a too rigid insistence upon an incidental purpose, but by a mere imperfection in the evidence showing that that purpose had been fulfilled. This savors of "sticking in the bark."

The current of authority supports the proposition that requirements as to the form of ballots will be held to be directory

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[9] Montgomery *v.* Henry (Ala. 1905), 1 L. R. A. (N. S.) 656.
[10] (1895) 91 Va. 322, 334.

merely, unless the statute contains language invalidating the ballots for failure to comply with the provisions.

The rule laid down by McCrary on Elections, 3 ed., § 190, in a passage often cited by the courts, is as follows:

> "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold whether the particular act in question goes to the merits or affects the results of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election."

Cases dealing with the question are too numerous to be noticed exhaustively, but from the mass of pertinent authority a few of the cases most nearly in point are selected.

A leading case is that of People *v.* Wood,[11] in which the contention was that ballots were invalid by reason of the insertion therein, contrary to law, of the names of certain candidates. Chief Justice Andrews disposed of this contention in the following striking language:

> "We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even willful misconduct of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult."

So, in People *v.* Board,[12] where the county clerk printed cer-

[11] (1895) 148 N. Y. 142, 42 N. E. 536.

[12] (1905) 94 N. Y. Supp. 996, aff'd on appeal, 183 N. Y. 538, 76 N. E. 1116.

tain words on a ballot which it was contended should not appear thereon, the court held that the ballot was not thereby invalidated even if the words were wrongly used on the ballot, and although the statute provided that none but ballots provided in accordance with the provisions of the election law should be counted. It is fair to say, however, that the court held that in fact the words were rightly on the ballot.

In Jones *v.* State,[13] the statute required that the ballots should bear the party emblem, that they should contain directions how to vote a "straight" ticket, and that they should be initialled by the poll clerks on the lower left hand corner. In fact they did not bear the party emblem of one of the candidates, contained no directions as to voting, and were initialled in the upper right hand corner. It was held that the ballots were valid. The case contains the following luminous statement of what it terms the "approved rule:"

> "All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

In Hodge *v.* Linn,[14] the statute required the judges of election to number the ballots so as to correspond with the number of the votes on the poll-books. This was not done. It was held that the requirement was merely directory.

In the case of Town of Grove *v.* Haskell,[15] it appeared that the law provided that ballots should be printed with a stub, perforated so that the ballot might be easily detached therefrom; that in the upper right hand corner of the stub should be printed or stamped the number of the stub and ballot, both to be consecutively numbered; that ballots should be upon white

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[13] (Ind. 1899), 55 N. E. 229.

[14] (1881) 100 Ill. 397.

[15] (Okla. 1909), 104 Pac. 56.

paper, not transparent, and that they should be bound in a book. Provision was also made for letting by bidding the contract for printing the ballots, and for an oath to be made by the printer, very much as in Virginia. It appeared that in fact the ballots were ordered printed without letting the contract as required by law, that no oath was made by the printer, that the number of ballots printed for each precinct was not shown, and no record thereof existed, that the ballots were not printed with a stub as required by law, that neither the ballots nor the stubs were numbered, and that the ballots were not placed in a book, and bound as required by law. It was not denied, however, that the ballots furnished were uniform. The Supreme Court of Oklahoma held, under these facts, citing a mass of authority, that the provisions of the law were directory merely.

In Thomas *v.* Adsit,[16] it appeared that where a statute in Michigan required that where money was to be raised by tax or loan, and a statute required that the ballots should have on them the words "for the tax" or "for the loan," or "against the tax" or "against the loan," as the case might be, and in place thereof the ballots contained statements showing the nature of the proposition, with the words "Yes" and "No" after each respectively, the requirements of the law should be held to be directory merely.

In State *v.* Fransham,[17] it was claimed that, as in the New York case, a county clerk had without authority inserted in the ballots the names of a number of candidates, and it was contended that on that ground such ballots should be rejected. The court disallowed this contention, holding the provision directory.

In Altgelt *v.* Callaghan,[18] it appeared that the law of Texas required that ballots should be printed on opaque white paper, and that the words "official ballot" should be written at the top of each ballot. Neither of these requirements was complied with. The court held that they were directory merely.

In Merrill *v.* Reed,[19] the law provided that the secretary of

[16] (Mich. 1898), 74 N. W. 381. [17] (Mont. 1897), 48 Pac. 1.
[18] (Tex. Civ. App. 1912), 144 S. W. 1166.
[19] (Conn. 1902), 52 Atl. 409 (opinion by Baldwin, J.).

state should give printed instructions as to the size of type to be used on ballots. Such instructions were given, but were not exactly complied with. The law provided that any ballots which did not conform to the requirements should be void and not counted. It was held that substantial conformity only was required.

Bowers *v.* Smith[20] holds that a ballot is not invalidated by the inclusion of the names of the candidates placed thereon contrary to law, although the statute provided in terms that ballots should not be counted other than "those printed by the clerks of the county courts according to the provisions of this article;" the court taking the view that the language quoted did not relate to the form in which the ballots were made up for printing by the clerk.

Numerous cases may be found in which it is held that ballots are invalidated by irregularities in their form, or by the failure of election officers to mark or number them in some way prescribed by statute, but almost uniformly it will be found that the local statute in terms attached the consequence of invalidity to such irregularities. A number of cases falling within this category are set forth in the margin.[21] While,

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[20] (1892) 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 49, 16 L. R. A. 754. Judges Gantt, Thomas, and Sherwood dissented in this case. Subsequently, in the case of McKay *v.* Minner (Mo. 1900), 55 S. W. 866, Judge Sherwood, speaking for Division No. 2 of the Supreme Court, overruled the Bowers case in a somewhat splenetic opinion; but less than one month later Judge Valliant, in Hehl *v.* Guion, 55 S. W. 1024, writing for Division No. 1 of the same court, cited the Bowers case with approval, his construction of the alleged prohibition on counting uninitialled ballots being the exact opposite of Judge Sherwood's. In Horsefall *v.* School District (Mo. App. 1910), 128 S. W. 33, the Springfield Court of Appeals cited all three cases, with others, to sustain the same point, blandly remarking that they are "not all in harmony in all particulars." This case supports the general rule stated above. Finally in Gass *v.* Evans (Mo. 1912), 149 S. W. 628, the Supreme Court of the State, sitting in banc, and speaking through Lamm, J., in one of the sprightliest opinions which it has ever been our fortune to read, reaffirmed the Bowers and Hehl cases in terms, and, in like express terms, overruled McKay *v.* Minner.

[21] Orr *v.* Bailey (Neb. 1899), 80 N. W. 495; Mauck *v.* Brown (Neb. 1899), 81 N. W. 313; Kirkpatrick *v.* Board (W. Va. 1903), 44 S. E. 465; West *v.* Ross (1873), 53 Mo. 350; Ledbetter *v.* Hall (1876), 62 Mo. 422;

however, it is believed that these cases—certainly the very large majority of them—were decided correctly, yet they are immaterial here, as we have seen, unless the word "prepared" as used in § 122d of the Code, refers to "preparation" by the electoral board, in which case their necessary consequence is indeed to invalidate unsealed ballots.

Three cases—two American and one English—deserve special mention, because they deal with the nearest approach to the Virginia requirement of sealing which we have been able to find.

In Wyoming and Washington there is a requirement that the ballots shall be stamped with an official rubber stamp and initialled by an election officer. The evident contemplation of the law in both these States is that the stamping and initialling shall immediately precede the act of voting.

The precise language of the Wyoming statute is:

> "In the canvass of the votes any ballot which is not endorsed by the official stamp or has not the name or initials of the judge of election as provided in this act shall be void and not counted."

And another section provides:

> "No officer shall deposit in the ballot box any ballot except a lawful ballot. A lawful ballot is an official ballot officially stamped and marked with the initials or name of a judge of the election, and offered by a qualified elector during the time of election."

Under these provisions of law, the Supreme Court of Wyoming held, in Slaymaker *v.* Phillips,[22] by two judges out of three, that both the stamping and initialling were essential to a valid ballot, and that ballots not stamped and initialled

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State *v.* Connor (Tex. 1893), 23 S. W. 1103; Kelly *v.* Adams (Ill. 1899), 55 N. E. 837; Choisser *v.* York (1904), 211 Ill. 56, 71 N. E. 940; Ex Parte Riggs (S. C., 1898), 29 S. E. 645; Kelso *v.* Wright (Iowa 1900), 81 N. W. 805 (in this case the court construed the statute as prohibiting the counting of the ballots, but there is grave doubt whether this construction is correct; the question is practically the same as that upon which Judges Sherwood and Valliant have expressed divergent views as above set forth).

[22] (1895) 40 Pac. 971.

could not be counted. Groesbeck, C. J., dissented, questioning this construction of the law, but holding that if so construed it was unconstitutional, as an undue legislative restriction upon the constitutionally given right of suffrage. Upon a rehearing,[23] the several judges adhered to their former opinions. It is believed by the writer that on the question of construction the majority of the court was right. As stated above, this article does not deal with the constitutional question.

Between the time of the original opinion and the rehearing, the case of Moyer *v.* Van de Vanter,[24] was decided by the Supreme Court of Washington, which held unanimously that provisions of the Washington law, substantially like the Wyoming law above quoted, were unconstitutional, for the same reasons as those urged by Chief Justice Groesbeck, though apparently his very recent opinion was not called to the Washington court's attention. The opinion of the latter court, however, was cited by him in his dissent upon the rehearing.

In Ackers *v.* Howard,[25] it appears that the English law required that ballots should be marked on both sides with an official mark; but the clause of the law declaring what ballots should not be counted invalidated in terms only ballots which did not have that mark on the back (and certain others not material here). The court, speaking through the late Sir Henry Hawkins, held that ballots having the mark on the back, but not on the face, should be counted.

Of these three cases, accordingly, it appears that the Wyoming case falls within the category of those collected in note 21, *supra,* while the English case is directly in line with the position herein taken. The Washington case is interesting principally as showing how far a court will go in order to preserve and protect the right of suffrage.

State *v.* Sadler [26] is a peculiar case. One candidate withdrew, necessitating the preparation of new ballots. The secretary of state did not have enough official paper to supply the required number of new ballots; and the county clerk accordingly took some of those first printed, drew a red line

[23] 42 Pac. 1049.
[24] (Wash. 1895), 41 Pac. 60.
[25] (1886) 16 Q. B. Div 739.
[26] (Nev. 1899), 58 Pac. 284.

through the name of the withdrawing candidate, and made up the deficiency in this way. Both the newly printed ballots and the "red-line ballots" were used in the election. It was held that the latter could not be counted. The statute is not set out in the opinion, but apparently did not contain words expressly invalidating the ballots. These, however, were obviously not uniform; and the court held them accordingly to violate the spirit of the Australian ballot system.

It is a close question whether or not this case opposes the current of authority, but we think there is no doubt that the current is as stated above. It follows that non-compliance with § 122d as to sealing does not, of itself, invalidate the ballots.

Limitations of space prevent more than a mere mention of another principle in the law of election contests which would lead to similar conclusions to those here reached—namely, that the courts, however ready to destroy a vote when the voter has been guilty of non-compliance with law, are loath to visit this penalty upon the innocent voter as the result of dereliction in duty on the part of election officers.[27]

By parity of reasoning, we do not deem material here and accordingly do not notice the mass of cases where the voter has indicated his choice in some way differing from that required or permitted by statute. The variety of questions presented by these cases furnishes an interesting illustration of the working of the laws of permutation and combination; but the cases are not in point where the irregularity is wholly on the part of election officials, and the question is as to the effect of such irregularity on the votes of innocent electors who have themselves complied with the law.

III. Conclusion—And a Suggestion.

The question herein treated, as stated above, has arisen in two contested election cases in Virginia known to the writer; and perhaps in others. In one, Judge West, sitting for the Circuit Court of Princess Anne County, held that the omission of

[27] A rather striking case decided in accordance with this principle is McGrane *v.* County of Nez Perce (Idaho 1910), 112 Pac. 312. Citations on this point could be almost indefinitely multiplied.

the seal did not invalidate the ballot; and in the other Judge Chichester, sitting for the Corporation Court of Norfolk, while holding that the question was not properly presented by the pleadings, yet intimated that had the question been before him he would have decided against the validity of the ballots.

It is the belief of the writer, as apparent from what has preceded, that the omission of the seal is not, in and of itself, vitiative. Of course, if the official character of the ballot were drawn in question, the presence or absence of the seal would constitute evidence on this issue.

The conclusion so reached derives support from a consideration of consequences. In neither of the two cases above referred to was it contended that the omission was intentional, or that any ballots were used other than those furnished by the electoral board; and in both cases unsealed ballots, or at least ballots upon which the seals could not readily be seen, were cast and counted for each candidate. The result of throwing out such ballots would be the substitution for elections by the people of a system of what may be termed "elections by accident," and would render it possible for an electoral board, either by fraud or negligence, to convert an election by the people into a game of chance.

Whatever may be the correct view of the question, it should not be suffered to remain unsettled; and the suggestion is hereby made that the legislature of 1916 consider the subject and remove this question from the region of possible doubt.

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